

CHAPTER 10. An Overview of the Adjudication Process

- 10.1 Receipting and Acceptance Processing
- 10.2 Record of Proceeding
- 10.3 General Adjudication Procedures
- 10.4 Transferring Jurisdiction within the Service
- 10.5 Requesting Additional Information
- 10.6 Post-Decision Case Actions
- 10.7 Preparing Denial Orders
- 10.8 Preparing the Appellate Case Record
- 10.9 Waiver of Fees
- 10.10 Refund of Fees
- 10.11 Order of Processing
- 10.12 Adjudicator's Responsibilities under FOIA/Privacy Act
- 10.13 Public Copies of Decisions
- 10.14 Directed Decisions
- 10.15 Exercise of Discretion; Uniformity of Decisions
- 10.16 Denial for Lack of Prosecution
- 10.17 Motions to Reopen or Reconsider
- 10.18 Certification of Decisions
- 10.19 Use of Classified Information in Adjudications Decisions

References

INA: 103

Regulations: 8 CFR 103.2; 8 CFR 103.5; 8 CFR 103.5a; 8 CFR 103.7

10.1 Receipting and Acceptance Processing.

(a) Receipting of Applications and Petitions at Service Centers. The procedural steps below pertain to applications and petitions in general. Since all service centers have contractor personnel handling mail, file and data entry, this segment deals with receipting requirements only in very general terms. The service centers have specific, detailed, written operating procedures (SOPs) which describe the functions to be performed by contractor personnel within the scope of the support services contract. These SOPs are included as appendixes to this manual. Proceed to the instructions for any individual form type to review the special instructions for that form.

(1) Open In-coming Mail; Deposit Fees. Since in-coming mail often contains fees, the in-coming mail room is a secure area, with access limited to specified personnel. Mail should be opened the same day it is received. When this is not possible, arrangements must be made to record the actual date on which the mail is received from the post office or private courier so that the receipt date can later be recorded on the application or petition itself. The receipt date is important to ensure fair, chronological processing and to enable efficient case tracking. Most importantly, the receipt date may be critically important in determining an applicant's legal

eligibility for a particular benefit. It is important that all mail be opened; fees removed, logged and deposited; and initial data entry completed as soon as possible.

(2) Screen for Applications and Petitions Which Must Be Rejected. No application form may be accepted for processing unless it is completed and signed and the proper fee submitted [See 8 CFR103.2(a).]. If, subsequent to receipting, a check submitted for payment is returned as uncollectible, the receipt (priority) date is forfeited. Rejected applications receive an "R" or reject number in the CLAIMS tracking system. Because rejection occurs before completion of CLAIMS data entry, the system maintains only skeletal information concerning rejected applications and petitions. If a rejected application is later resubmitted, process the case as if it had never been previously delivered to the Service.

Although the instructions for each type of application or petition specify where that application or petition is to be submitted, submission to an incorrect office (or incorrect post office box where more than one box is used by a service center to sort cases by application type) is not a reason for rejection. Such cases should be receipted and routed to the appropriate office for processing.

(3) Affix Bar Code. Affix the CLAIMS bar code receipt number on the application and forward the case for data entry and file creation.

Applications filed at service centers: I-129; I-129F; I-129S; I-129W; I-130; I-131; I-140; I-360; I-485; I-526; I-539; I-589; I-730; I-751; I-765; I-817; I-821; I-824; I-829; N-400.

(b) Receipting of Applications and Petitions at Local Offices. The following local office receipt processing steps pertain to applications and petitions in general. Some field offices have contractor personnel who perform some of the receipting functions; in other offices Service employees handle all mail, file and receipting activities. This section applies generally to all field offices, but does not supersede the specific written procedures followed by contractor personnel engaged in receipting activities or local procedures in place for Service personnel involved in receipting applications and petitions. In field offices cases may be filed either in person at an information counter or drop box, or by mail. Cases which are mailed or left in a drop box are handled in a manner similar to service center cases, as described above. Cases which are filed at an information counter are generally reviewed by an information officer prior to acceptance. The information officer may screen a case more thoroughly, checking for required documentation and basic eligibility, in addition to the basic screening for signature and correct fee. At the end of this paragraph is a list, by form number, of applications and petitions which require special processing. Click on any individual form number to jump to the special instructions for that form.

Note: If a completed application is signed and the fee is attached or waived, but the information officer identifies missing documentation or believes the applicant is ineligible for the benefit

sought, the case *must be accepted* if the applicant insists on filing. The information officer should explain what is missing or why the applicant is ineligible and suggest an appropriate remedy. However, if the applicant remains insistent on filing, the case should be accepted and a note attached for the adjudicator explaining the deficiency.

Applications filed at district offices: I-17; I-90; I-102; I-130; I-131 (parole request); I-191; I-212; I-360; I-485; I-566; I-600; I-600A; I-601; I-612; I-765; I-821; N-300; N-336; N-410; N-455; N-470; N-565; N-600; N-643; N-644.

(c) Initial Evidence Requirements. Before an application may be adjudicated, certain requirements must be met [see 8 CFR 103.2(b)]. Specific requirements necessary for proper filing of each type of application or petition are included in the instruction sheet for that application or petition. Every application, regardless of the benefit sought, must include complete information in all required blocks, the application must be signed and the required fee attached (unless the fee is waived). Applications which lack these initial requirements are "rejected" rather than denied. Applications which are lacking in other specific requirements may be accepted, but they will later be returned for submission of additional evidence. Failure to submit such required additional evidence will generally result in denial or termination for lack of prosecution, according to the circumstances.

(d) Data Entry and File Management. After receipting new cases are sent for data entry, central index checks, lookout checks, and file creation or requests. The following general steps should occur:

(1) The application and supporting documents are housed in a file jacket. Offices using the CLAIMS receipting system label the file jacket with a bar code label bearing the CLAIMS receipt number. Required data entry is completed. Data elements required for each type of application are prompted by the CLAIMS receipting screen for the specific application/petition type. [See CLAIMS Users Manual for details.] Relating files, such as family members or group members, should be bundled together.

(2) CLAIMS will automatically search for and request any existing file on the applicant or beneficiary, but not on a petitioner or other related party. Such requests must be manually initiated by the adjudicating officer, if he or she deems it appropriate. Attach relating files to the receipt file prior to forwarding the case for adjudication. Forward cases not requiring a new or requested "A" file prior to adjudication immediately after data entry.

Note: A new "A" file is opened only for adjustment of status cases (I-485) and asylum cases (I-589) where no such file already exists. An "A" file may be later created for other types of cases in certain instances, such as when a case is being denied and removal proceedings are being initiated. Adjudication of a case using a "T" (temporary) file may proceed if a permanent file cannot be located. Generally, if a permanent file cannot be located within 90 days, the temporary file is used. A note should be placed in the file by the adjudicating officer whenever such action is required.

10.2 Record of Proceeding.

(a) Definition. A record of proceeding is the organized, official material constituting the record of any application, petition, hearing or other proceeding before the Service. The Service has specifically prescribed a format for assembly of a record of proceeding and for identifying record and non-record material. [See Chapter 3(E) of the *Records Operations Handbook*.] A record of proceedings may be housed in an "A" file or other agency file or it may be housed in a separate file jacket for consideration by the immigration court or an appellate office on appeal, certification or motion. Responsibility for maintaining a record of proceeding lies with the officer to whom the case is assigned.

(b) Exclusion of Restricted Material from a Record of Proceeding. A service director or officer-in-charge may consider and base a decision on information not contained in the record and not made available for inspection by the applicant or petitioner, provided that the regional director has determined that such material is relevant and is classified under Executive Order No. 11652 (37 FR 5209; March 10, 1972) requiring protection from unauthorized disclosure in the interest of national security. Such information will fall into one of the following categories:

- Classified material
- Information confidentially furnished
- Security report from the FBI, other security agencies, or any report from a Government agency carrying a restriction as to its use.

Such material must be maintained separately from the rest of the record, in the manner described in the *Records Operations Handbook*, Chapter 3(E)(4).

If the regional director determines that disclosure of information within these categories would be prejudicial to the public interest, safety, or security, a memorandum to that effect must be included in the record of proceeding. Such memorandum should not contain information which would make the memorandum itself classified. [See 8 CFR 103.2(b)(16).]

(c) Investigative Reports. A Service investigative report need not be made part of a record of proceeding if the presentation of the exhibits attached to the report will suffice. The exhibits (unless they fall within the categories discussed in the preceding paragraph) may be removed from the investigative report and placed in the record. In that event, the remainder of the report will be filed on the right side of the file, and a plain sheet of paper attached to the report indicating the location of the detached exhibits. If an investigative report itself contains information which must be relied upon in making a decision, it must be made a part of the record. Under no circumstances, however, may the administrative pages of a report (Forms G-166A) be made a part of the record.

Reports from other agencies which are not of a security nature and which bear no security classification or other restrictions on their use may be included in a record of proceedings. When a report from a security agency (including foreign law enforcement or security agencies) is negative or contains information not being used in the decision, it should be filed on the right

(non-record) side of the file jacket. Reports from Canadian intelligence agencies may never be placed in the record portion of a file unless clearance has been obtained from the Service liaison officer in Ottawa.

(d) Removing Record Material. If it becomes necessary to remove material from a record of proceedings, either during or following that proceeding, a sheet of plain paper must be inserted in the record in its place. Note on the paper a description of the material removed, the reason for removal and the location where the material will be filed, as well as the name of the employee and date of action.

(e) Availability of Records for Review. Upon request, a record of proceeding shall be made available to applicants, petitioners and their authorized representatives who have properly file Form G-28. Appropriate action must be taken to ensure that any non-record materials are not compromised. To ensure this, physically remove either the record or the non-record portion of the file from the file jacket.

10.3 General Adjudication Procedures.

The following steps generally apply to all cases processed by the adjudications unit within a service center or local office. Depending upon local procedures, these steps may be handled by a single adjudicator, or they may be broken down according to task with various tasks being handled by different employees.

(a) Case Review. Each case must be thoroughly reviewed to determine jurisdiction, presence of required supporting documentation, existence of relating files and basic statutory eligibility. If there is a relating A file, whether or not reviewed, endorse the file number on Forms I-94 and the petition or application if they have not already been so noted.

(b) NAILS/IBIS Checks.

(1) General requirements. Except as provided in paragraph (b)(2), an application or petition shall not be approved or revalidated until the name of the applicant or principal beneficiary, and the names of any spouse and children who may derive status through their relationship to that applicant or principal beneficiary, have been checked against the National Automated Immigration Lookout System (NAILS) and the Interagency Border Information System (IBIS). If such check or other information reveals the existence of relating files, they shall be obtained and considered before making a determination upon the application or petition. After NAILS has been checked, a stamp bearing the legend "NAILS CHECKED" shall be placed above the "date filed" box on the petition, and initialed by the adjudicator. (See chapter 31 of the Inspector's Field Manual for more detailed information on the NAILS and IBIS systems.)

(2) Exceptions. The NAILS and IBIS systems do not need to be checked with respect to any applicant or beneficiary if:

- He or she is under 14 years of age;

- His or her relating "A" file has been reviewed; or
- He or she is a beneficiary on a nonimmigrant visa petition and the names of the beneficiaries are unavailable at the time of adjudication.

NOTE: The CLAIMS system does not automatically check the NAILS or IBIS system.

(3) Other Service Records. A check of Headquarters records may also be made with respect to the applicant, petitioner or beneficiary, but only when it is believed such a check would produce pertinent information.

See Chapter 3(B)(1) of the Records Operations Handbook for information on checking other Service records.

If a Headquarters record check was made in addition to a NAILS check, a stamp bearing the legend "NAILS-HQREC CHECKED" shall be placed on the petition, and initialed by the adjudicator; any response returned with notations showing "no record" or "no file exists" shall then be destroyed.

Any further action which may be required, short of approval of the petition, shall not be delayed while the request for the Headquarters record check is pending.

(c) Adjudication. The adjudicator must carefully examine the application form and all supporting documents. The examination should address (but not be limited to) the following questions:

- Is the form complete and signed?
- Is the applicant or petitioner represented by counsel with Form G-28 on file?
- Are there any responses which require further explanation or indicate there may be a need for additional documentation?
- Are all necessary supporting documents present and translated into English, if necessary?
- Is the beneficiary statutorily eligible for the benefit sought?
- Are all supporting documents authentic and unaltered?
- Is there any reason to suspect fraud?
- Are there any legal precedent decisions or court orders relevant to the case?
- Are there any ancillary applications which should be filed by the applicant (e.g. a waiver application, adjustment application, advance parole request, or employment authorization request)?

(d) The Burden of Proof. Bear in mind that the burden of proof in establishing eligibility for an immigration benefit always falls solely on the petitioner or applicant. The Service need not prove ineligibility. Each application and petition form includes specific evidence requirements necessary for approval. When an applicant or petitioner can establish that certain primary evidence is unavailable, secondary evidence, also in specific forms, may be provided. Experienced officers become familiar with a wide range of documents submitted as evidence.

Sound judgement is required to determine which forms of primary and secondary evidence should be accepted in individual cases. In addition to reliance on past experience, there are sources of information for verifying information discussed in chapter 14. [See *Matter of Brantigan*, 11 I&N Dec. 453 (BIA 1966).]

Strict rules of evidence used in criminal proceedings do not apply in administrative proceedings. Usually, any oral or documentary evidence may be used in visa petition proceedings. Copies of public documents, certified by the person having custody of the originals, are generally admissible. [See also Chapter 11 of this manual for a discussion of evidence.]

(e) Inspection of Evidence. The adjudicator must afford a petitioner or applicant an opportunity to inspect and rebut adverse evidence used in making a decision. Prior to denial of any application or petition based on such evidence, the Service routinely issues a "notice of intent" to deny, by letter, explaining the nature of the adverse information. The applicant or petitioner may choose to respond in writing or may ask to inspect the record of proceedings prior to submission of a rebuttal. A notice of intent must specify the date by which a response must be received and instruct the applicant or petitioner that a failure to respond will result in a denial. [See 8 CFR 103.2(b)(16).]

(f) Decision: Approval. If a case is ready for approval, the adjudicator must stamp the action block with his or her approval stamp and approved "security" ink. In some cases, the officer's signature is also required. Depending upon local procedures, a work sheet for clerical action may be completed, or the adjudicator may update the CLAIMS system to initiate generation of an approval notice to the applicant or petitioner and the attorney of record, if any. In some instances, the adjudicator may manually complete processing. The adjudicator must then forward the case file for disposition: to the file room, the National Visa Center or consular post, or another Service office. In emergent cases, the petitioner may request that a cable be sent to the consular post. The cable formats for such notifications are included as Appendix 10-4. Each service center has a quality review process which may review some segment of completed cases for proper adjudication.

(g) Decision: Denial. If a case is to be denied, the adjudicator must so note the action block and prepare the written denial notice. Denials may consist mainly of "boilerplate" paragraphs explaining the legal basis for the adverse decision or they may be entirely original. In all cases, the specific facts of the individual case must be explained in the decision. If a denial is based on precedent decisions, those decisions should be properly cited in the body of the denial notice. The applicant or petitioner (or representative), must be advised of the action and provided with information concerning his or her right of appeal. Depending upon local procedures, denied cases may be held in suspense until an appeal is filed or the appeal period lapses, or the case file may be sent to another office for follow-up action. Denial decisions are normally sent to a supervisory officer for review and signature prior to mailing. Service of a decision is ordinarily accomplished by routine service as prescribed in 8 CFR 103.5a. Personal service is required only when an adverse action is being initiated by the Service, such as a rescission or revocation.

10.4 Transferring Jurisdiction within the Service.

A case pending with one office or officer may be transferred to another officer or jurisdiction without action for several reasons, such as:

- the case was misfiled and jurisdiction belongs to another office
- the applicant moved to another jurisdiction
- a case pending with a service center adjudicator appears to warrant a personal interview in a local office
- an officer is transferred to other duties and a supervisory officer transfers pending casework to another officer in the same jurisdiction
- Service regulations require movement of a case to another office for specific action.

The transfer of a case should be carefully considered before action. Jurisdictional issues should, if possible, be settled before the initial officer spends significant time on the case. Before leaving their current position, officers being transferred should be given time to complete cases which they have started, rather than reassigning unfinished work to another officer. Cases being transferred from a service center to a local office for interview or investigation should be reviewed by a supervisory officer before the transfer is initiated to ensure that the matter cannot be readily resolved through in-house research: a phone call to an employer, review of existing Service files, or use of readily available research tools. If the transfer is deemed appropriate, a memorandum to the file should be written to explain the status of the case and the reasons for the transfer. Such a transfer results in a significant additional workload for the Service. While this may be a very valuable and effective tool in certain circumstances, it should not be abused—used as a way of "dumping" difficult cases.

10.5 Requesting Additional Information.

(a) General. Whenever a case is received and the adjudicator cannot decide the case based on the information submitted, there are five options. Each of the options must be considered carefully, since each requires an expenditure of Service resources to some degree. The available options are:

- internal research using available sources such as those described in chapter 14 of this manual;
- requesting the applicant or petitioner to submit additional documentary evidence;
- conducting an interview with the petitioner, beneficiary, applicant or other witnesses;
- if local office policy allows, conducting a field examination (see chapter 17); and
- conducting an investigation.

(b) Requests for Additional Evidence. Just as the transfer of open cases to another office should be avoided, if possible, so should requests for evidence (RFEs) from the applicant or petitioner. Requesting additional evidence or returning a case for additional information is a drain on Service support resources, results in duplication of effort by the adjudicating officer and delays completion of the case. Up-front case review must be thorough. Evidence or information not submitted with the application, but contained in other Service records or readily available from external sources should be obtained from those sources rather than by returning the case to the

applicant for the information or evidence.

In particular, requests for "discretionary" evidence should be carefully considered. For example, a request for tax returns or other financial information as evidence of a petitioner's ability to pay the wage offered on an "H" petition might be reasonable if the petitioner is a small start-up company, but it would not be reasonable to request such information from a "Fortune 500" company. It is important that the adjudicator exercise common sense and good judgment to strike a balance between obtaining necessary information for thorough, correct decision-making and pointless "fishing trips."

If a case must be returned for evidence, it is essential that all required evidence be identified and requested. (Occasionally, the additional evidence itself will raise new questions which could not have been foreseen upon the initial review, but this is extremely rare and can be kept to an absolute minimum by a careful initial review of the application/petition and detailed explanation of the reasons for the RFE.) Multiple, sequential returns of a case are particularly wasteful and demonstrate a lack of professional competence on the part of the adjudicator.

Upon resubmission of the application or petition, or compliance with the RFE, the case should be returned to the processing order in accordance with its original filing date. This will normally make the case one of the next ones (if not the very next one) to be adjudicated as it had already reached the "head of the line" at the time the RFE was made.

(c) Interview Requests. In most instances, a request for an interview means sending the case from a service center to a local office. If such action is necessary, the officer requesting the interview must identify the specific information which he or she believes can best be obtained by a personal interview. The most common interview requests involve spouse cases, although an interview may be appropriate in other types of cases as well. It is inappropriate to go on "fishing expeditions", transferring cases as a result of vague suspicions. The requesting officer should list specific items which the interviewer should probe. In addition, the requesting officer should conduct any preliminary research which may be possible, such as verifying telephone numbers, employment or business records, etc., and provide the results for use by the interviewer.

(d) Investigative Requests. (1) General. Investigative requests should be considered only as a last resort. An interview should generally be conducted first, including sworn statements and solicitation of all pertinent information. Supervisory consultation is also required before an investigation may be requested. Because investigative resources are extremely scarce throughout the Service, some requests may be rejected without action by the Investigations Branch. In such a case, consult with supervisory personnel and continue processing the case. Overseas investigations, like domestic ones, should be considered only as a last resort.

There may be some situations, such as when a case fits into a pattern of cases already under investigation, when an interview is not conducted before referral to Investigations. This may be necessary to avoid alerting the parties involved that an investigation is being conducted.

Whenever a case has been referred for an investigation, a call-up should be maintained in Adjudications.

See Chapter 3.6(b) of this manual and chapter 61 of the *Special Agent's Field Manual* for a discussion of case acceptance criteria by the Investigations Program.

(2) Overseas Investigation Requests. The following guidelines apply when making a request for an overseas investigation:

(A) Format. A request for overseas investigation must be made in a memorandum format, except in extraordinary circumstances. E-mail requests are acceptable in time sensitive cases, if an electronic copy of the relating memorandum is attached.

(B) Channels. The request should be sent to the appropriate overseas office as listed in appendix 10-2. The request must come through proper channels. An overseas office cannot respond to requests for investigation coming directly from an adjudicating officer. The memo should indicate it is from district director, and must be signed by an official who is at least the supervisor of a particular unit. Overseas offices will not act on the requests coming directly from an adjudicating officer, but will instead notify the officer's supervisor and suggest that the memorandum be made through appropriate channels.

(C) Types of Cases. There are no limitations on the particular types of cases that may to be referred for an overseas investigation. Most requests for overseas investigation involve verification of education credentials, employment history, family census registers, passport applications, etc. However, when requesting an overseas investigation bear in mind that the resources of overseas offices are limited. Do not make unnecessary or frivolous requests. Also, requests for consular records (e.g., for a copy of the alien's NIV application) should be sent directly to the consulate in question.

(D) Specificity. A memorandum requesting the investigation should provide as much detail as possible, including the information which was developed at the stateside office to warrant an investigation. The more specific the request, the more detailed the response which the overseas office can provide.

Each request for overseas investigation must identify the office, unit and (if appropriate) individual to whom the report is to be sent; the full name and date and place of birth of the alien; the type of application involved (I-130, I-140, I-485, etc); the reason(s) for the request (i.e., why the applicant/petitioner's claim is suspect); a list of any specific issues to be resolved (e.g., whether the alien operated a particular type of machinery while employed at a particular company). The requestor should include a high-quality photocopy of all relevant documents (if the request is made by e-mail, indicate that whether the documents are being forwarded by fax or by regular mail). The following lists sets forth additional information which should be provided depending on the type of request being made:

TYPE OF REQUEST

SUGGESTED INFORMATION

Employment verification

Dates of the employment; name and address of the business where the alien was employed; name of supervisor (if different from owner of the business); type of work performed. Note: In many countries small businesses are volatile by nature and employment which occurred many years ago often cannot be verified. Family relationships

Name and date and place of birth of relative; dates and addresses of cohabitation (if alien and relative resided together); other persons who resided at same address

Official records of birth, marriage, divorce, death, etc.

Location of record; name of the keeper of the record (if known)

Verification of educational credentials

Dates of attendance at school, full address of school's registrar or other keeper of records, location of campus (if different from the registrar's), major subject(s) studied

(E) Follow-up Requests and Requests for Copies of Prior Investigative Reports.

Unless otherwise specified in Appendix 10-2, address followup requests and requests for additional copies of completed reports to the same officer as the original request.

NOTE: Repeated requests for previously completed and returned investigative reports which were lost after receipt in the relevant stateside office are a major problem area for some overseas offices. Often an overseas office may have records of an investigation which has been completed and returned, but will no longer have a hard copy of the report. A local (domestic) office which has difficulty in tracking overseas investigative reports may wish to assign a particular officer or supervisor as an overseas investigation liaison officer. Likewise, a district which generates a substantial number of investigations requests for a particular overseas area may consider designating a liaison officer and/or mailing address for such overseas area. (For example, the Los Angeles district office has designated a liaison officer through whom communication to/from Los Angeles and Seoul is channeled. They have also designated a special P.O. box to which the Seoul office sends completed reports.)

(F) Feedback. Feedback is probably not necessary in most instances. However, in cases where an investigation is particularly valuable for reasons which may be useful in future investigations, the domestic office should so advise the overseas office. Likewise, if an investigation not helpful because it does not address the principal issue(s), because it contains erroneous information, or for other reasons, the overseas office should also be so informed to assist that office in improving the quality of future investigations. Furthermore, information which is of general intelligence value should be reported through regular channels (e.g., the district intelligence officer).

10.6 Post-Decision Case Actions.

(a) Forms I-824. In most instances once a case is adjudicated and notices are sent to the applicant or petitioner no further action on the part of the adjudicator is required. However, there are certain situations which may require additional actions by the Service. Such actions maybe initiated by the applicant or petitioner, ordinarily by filing Form I-824, or they may independently be initiated by the Service, such as when a beneficiary is unlawfully in the United States and subject to removal proceedings.

Form I-824 may be filed, with fee, to request a duplicate approval notice or to transfer a case requiring visa issuance from one consulate to another. Jurisdiction to act on an I-824 lies with the office which originally approved the case, or, if a case file has been transferred, with the office currently holding the file. Follow local procedures for completing action on forms I-824, including updating CLAIMS and notifying the applicant.

(b) Removal Proceedings. Institution of removal proceedings against an alien beneficiary unlawfully present in the United States may be considered in certain instances. Because the Service has limited resources available for enforcement activities, many offices must reserve most calendar openings for removal proceedings for egregious violators such as criminal aliens. Institution of removal proceedings against "routine" status violators, even those who are unlawfully employed, may not always be possible. However, the adjudicating officer should make note of the status of a beneficiary and adhere to local policy regarding enforcement action.

(c) Adverse Information. There may be instances where a petition or application is approved, but information is discovered which impacts the admissibility of the applicant or petitioner. In such cases, the "remarks" block of the petition may be noted with the information. In other cases, it may be appropriate to post a NAILS lookout to intercept the alien if he or she attempts entry.

10.7 Preparing Denial Orders.

(a) General. This paragraph provides basic guidelines to use when preparing a decision to deny an application or petition for a benefit under the Immigration and Nationality Act, or to certify a decision to either the AAO or the BIA.

For many applications and petitions, standardized forms exist, or "canned" paragraphs have been prepared, for assistance in preparing a formal decision. For many other applications and petitions, a individual formal order must be prepared. When using standard forms and "canned"

paragraphs, make sure that the language of the form or paragraph is appropriate for the situation involved. It is all too easy to get into the habit of trying to make the situation fit the language of the canned decision. The following standard forms pertain to the applications listed:

Application/Petition Type	Form Number
Any application adjudicated by a service center or by a district or local office using the CLAIMS system	I-797
Any application or petition where the decision is being certified to the Office of Administrative Appeals or to the Board of Immigration Appeals	I-290C
Application to Extend Nonimmigrant Status (Form I-129 or Form I-539)	I-541
Application to Register Permanent Residence or Adjust Status (Form I-485)	I-291
Application to Change Nonimmigrant Status (Form I-539)	I-543
Petition for Alien Fiance(e) (Form I-129F), Petition for Alien Relative (Form I-130), Immigrant Petition for Alien Worker (Form I-140), Petition for Nonimmigrant Worker (Form I-129).	I-292

Office letterhead may be used for denial notices for application types not specified above.

(b) Elements of a Formal Decision. Use simple language which can be understood by the applicant. Although immigration law can involve complicated legal principals, the decision should be written in clear, simple English so the applicant or petitioner can understand it. Avoid Latin terms and other “legalese” language.

A formal decision should contain five elements, each of which may be one or more paragraphs in length:

- (1) An introduction which describes the benefit being sought
- (2) A description of the criteria which the applicant or petitioner must meet in order to obtain the benefit being sought. This criteria should explain both the statutory requirements and (where appropriate) the discretionary standards and precedents.
- (3) A description of the evidence in the case in question. This includes both the documentation submitted by the applicant or petitioner, and the other evidence which is contained in the case file. If the applicant or petition cannot reasonably be presumed to be already aware of the evidence, he or she must be given an opportunity to rebut the evidence before a decision is made. [8 CFR103.2(b)(16)(i)]

(4) A discussion of how the evidence in the case fails to meet the criteria for obtaining the benefit. In many cases, there may be more than one reason for the denial, in which case normally all should be discussed. In some cases, however, when the statutory basis for the denial is clear and incontrovertible, a discussion of discretionary issues may be unnecessary.

(5) A conclusion which informs the applicant or petitioner that the case is being denied. It should also inform him or her as his or her appeal rights (if any) and whether the decision is without prejudice to other benefits the individual is seeking or is likely to seek.

Each decision should include a copy of Form M-188, Appeals and Motions, which discusses procedures for filing appeals and motions. (Since fees for appeals and motions tend to change faster than the M-188 is revised, make sure that the version of the form being sent lists the correct amounts.)

Where the applicant or petitioner has appeal rights, include copies of the appropriate forms:

- Appeals to the Board of Immigration Appeals (Form EOIR-29)
- Appeals to the Office of Administrative Appeals (Form I-292B)

(c) Signatory Authority. Formal orders of denial or certification (approval or denial) are prepared for the signature of the district director, service center director or officer-in-charge delegated pursuant to 8 CFR 103.1(f) and (g). If authority has been re-delegated, the decision must be made in the name of the director or officer-in-charge. The original signed copy is delivered to the petitioner, applicant or attorney of record. An initialed and facsimile-stamped copy is retained in the file and becomes part of the record of proceeding. In the lower left-hand corner of the file copy add the phrase “recommended by” and the name of the officer who prepared the order. Public copies of orders should not include this information.

10.8 Preparing the Appellate Case Record.

(a) Administrative Appeals Office (AAO) Cases. **[reserved]**

(b) Board of Immigration Appeals (BIA) Cases. In order to send an appeal of an I-130 or I-360 (widow) to the BIA for consideration, a separate record of proceedings file must be set up. Using a standard manila file folder stamped “record of proceeding” on the outside, place all record documents on the right side of the file using an “Acco” fastener. The file should be set up in an orderly fashion using a logical chronological sequence with the appeal (Form EOIR-29) and brief on top, followed by the decision itself, the petition, supporting documentation and all other relevant record material. Non-record material and duplicate material should remain in the actual file jacket. A record going to the BIA must have an “A” file number, even if the denial was originally housed in a CLAIMS receipt file. The file number on the tab (odd numbers on left, even on right) is preceded by the three-letter FCO code of the office forwarding the appeal. Follow local procedures regarding supervisory review and preparation of an appellate brief by Service counsel before forwarding the record to the BIA. In the original file, attach a copy of the EOIR-29 on top of the record side indicating the action taken. Do not date the form or note that it has been forwarded until it has been reviewed and briefed by counsel. Follow local procedures

for housing the “A” file pending a decision by the BIA.

When a record is sent to the BIA and the decision was based on classified information, that information must be removed from the file and mailed to the Service representative at the BIA, with an appropriate cover memorandum. This material should be forwarded simultaneously with the record of proceedings.

One copy of the decision of the district or center director with the stamped or typed notation "BIA copy" on the bottom of the face page of such order, shall be stapled to the left inside of the record of proceeding folder. In addition, two additional copies stamped “Public Copy”, but with no identifying data deleted, shall be stapled to the left inside corner. [See also “Public Copies” discussion in paragraph 10.13.]

The outside front of the record of proceeding folder shall be stamped "Record of Proceeding." In every case involving an alien detained by or for the Service or when an alien's detention is imminent, a conspicuously marked flag showing his or her detention status shall be firmly stapled to the outside of the folder being forwarded.

10.10 Refund of Fees.

When an applicant or petitioner pays a filing fee on an application, he or she is seeking a decision from the Service regarding the applicant or beneficiary’s eligibility for the benefit(s) being sought. In general, the Service does not refund a fee or application regardless of the decision on the application. There are only a few exceptions to this rule, such as when the Service made an error which resulted in the application being filed inappropriately or when an incorrect fee was collected. For example, if the Service advises an applicant to file a waiver application for a ground of inadmissibility which is inapplicable to that applicant, the fee should be refunded.

If an applicant or petitioner believes that he or she is entitled to a refund of fee, he or she should file Form G-266, Refund of Immigration and Naturalization Fees. The form is available on the INS Intranet. Send the completed form to the Debt Management Center (DMC), 70 Kimball Ave., South Burlington, VT 05403-6813 or fax it to (802) 660-5107. Retain a copy for office records, following local procedures. Send only the completed form to DMC, retaining any back-up documents, applications, etc. The DMC will notify you of the disposition of the request. Only a single refund may be requested per form. Complete the form in accordance with the following instructions:

Block Number	Explanation of Entry
1	List the office in which the form was prepared
2	Assign a request number for the refund using the FCO-Fiscal Year-Sequential Number format. (For example: LOS-2000-0011 would be the 11 th request submitted by the Los Angeles office during FY 2000.)

Block Number	Explanation of Entry
3	Enter the requesting office mailing address
4	Enter the area code and telephone number of the person to whom questions regarding the refund may be directed
5	Enter the name and address of the person to whom the refund should be sent. Fee refunds for minors should be sent to a parent or guardian "in behalf of" the child's name. This information must be displayed in the sequence listed below. Use an additional address line, if necessary - Line 1: First name, middle initial, last name of payee - Line 2: In behalf of _____ (<i>if applicable</i>) - Line 3: Street address or P.O. Box - Line 4: City, state and Zip code
6	Record information necessary to file and retrieve the disposition copy after action by the DMC. (receipt file number, etc, according to local procedures). The requesting office remains responsible for maintaining sufficient information and files for a proper audit trail
7	Use this space to identify (name and phone number) a point of contact in the event The DMC has questions concerning processing of the request
8	Enter the application form number (or "fingerprint fee" if appropriate)
9	Enter applicable section of law, if any
10	Enter the exact amount of the fee to be refunded
11	Circle the reason for the refund: "overpayment", "Service error" or "other". If "other" is circled, there must be a brief explanation. Forms submitted without explanation will be returned by DMC without action
12	Original signature of signatory authority.*
13 - 15	Leave blank – for DMC use only

* If delegated below the office head, the office head must send a memorandum defining the specific delegation. The memorandum must contain the specific authority being delegated (e.g. approval of Fee Refund Requests, Forms G-266), the name, title and signature of each subordinate receiving the delegation and the effective date of the delegation.

10.11 Order of Processing.

(a) Routine and Expedited Cases. Generally, applications and petitions should be processed in the order in which they are received by the Service. Exceptions can, and should, be made for a

number of different reasons, and sometimes those reasons may appear to conflict with one another. Reasons for prioritizing certain applications and petitions over others may relate to:

- A statutory requirement, such as the requirement that joint petitions for removal of conditions under the marriage fraud amendments be interviewed within 90 days of filing and adjudicated within 90 days of being interviewed (section 216 of the Act), or that L-1 petitions be adjudicated within 30 days of filing (section 214(a)(2)(C) of the Act);
- Service-wide policy pertaining to the type of application or petition being filed, such as a Commissioner's fiscal year priority that backlogs in a given type of application or petition be reduced to a specified level;
- Current events in the homeland of the applicant or beneficiary, such as a natural disaster or civil war;
- Imminent events which may effect the eligibility of the applicant or petitioner, such as the termination of a program whose duration is limited by statute or the "ageing out" of a dependent,
- A need to coordinate actions with other branches of INS, or with other agencies in order to meet common goals
- To correct an injustice which may have occurred, or to prevent one which may be about to occur.

(b) Cases Held for Submission of Additional Information. When an application or petition does not provide sufficient information to make a decision, additional evidence may be requested in accordance with 8 CFR 103.2(b)(8), and the processing of the case held in abeyance until a response is received (or the 12 weeks allowed for a response has expired). Upon receipt of the response (or passage of the allotted time), the case shall be returned to its processing place based on the original filing date. This will normally make the case ripe for immediate adjudication, since it had already reached the that point once.

(c) Cases Pending Investigation or Decision Deferred for Other Reasons. When a case is returned from Investigations, it should be returned to its place chronologically, according to receipt date, for processing. Cases sent to Investigations should remain on a local call-up system within Adjudications and reviewed periodically to determine if investigation is still warranted or if circumstances have changed. Similarly, if a decision on a case is deferred for any other reason, a call-up system should be maintained locally and the case reviewed to determine if circumstances have changed sufficiently to warrant final action.

10.12 Adjudicator's Responsibilities under FOIA/Privacy Act.

(a) General. As employees of the Service, you work with personal information about other people. You could not perform your job (i.e., you could not determine an applicant's eligibility for benefits) without knowing some personal information about those people. The Freedom of

Information and Privacy Acts (FOIA/PA) place responsibility on the Service, and the individual officer, for disclosure of information which the public has a "right to know," while safeguarding individuals against an invasion of their personal privacy.

(b) The Freedom of Information Act. (1) General. The Freedom of Information Act (FOIA) 5 U.S.C 552, provides access to all Federal agency records except those which are protected from release by exemptions (reasons an agency may deny access to a requester). The FOIA can be used by anyone to access government records regardless of citizenship. The FOIA only applies to the Executive Branch of the Federal government. It does not apply to Congress, the courts, local governments or private organizations. Requests for access to INS records under the FOIA must be in writing (by letter or by Form G-639 Freedom of Information/ Privacy Act Request) and when received must immediately be forwarded to the FOIA/PA officer for proper handling.

(2) Handling FOIA Requests. The FOIA requires the Government to respond to requests for information that are not exempt within 20 working days after receipt of the request. Your responsibility as an employee is to conduct a thorough search for the records that have been requested and provide them to the FOIA/PA officer of your organization as quickly as possible. If you believe some or all of the information should not be released to the public, inform the FOIA/PA officer and he or she will work with you to determine whether such information can be exempted or not. Be sure to give the FOIA/PA officer a copy of all records that are responsive to the request to preclude being held responsible for "arbitrary and capricious" withholding by a court.

(3) FOIA Exemptions. There are nine exemptions which may be cited as grounds for withholding records under the FOIA:

1. National defense or foreign policy matters required by executive order to be secret. Such records must be properly classified and may be inspected "in camera" by a court.
2. Matters related solely to internal personnel rules and practices of an agency.
3. Matters specifically exempted by some other statute.
4. Certain privileged or confidential information such as trade secrets and confidential business information.
5. Certain interagency or intra-agency memos or letters such as discussions and recommendations that are pre-decisional in scope (e.g., attorney-client information, attorney work product, and adjudicator's drafts of decisions).
6. Personnel, medical, or other files which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.
7. Law enforcement investigatory records may be withheld only if disclosure could (a) interfere with enforcement procedures; (b) prevent a fair trial; (c) constitute an unwarranted invasion of privacy; (d) disclose confidential sources and, in criminal

investigations and national security intelligence investigations, disclose confidential information obtained only from a confidential source; (e) disclose techniques and procedures for law enforcement investigations or prosecutions that could risk circumvention of the law; and (f) endanger the life or safety of any person.

8. Audits of financial institutions.

9. Geological maps and data on wells.

(4) FOIA Exclusions. The Freedom of Information Reform Act of 1986 creates a new mechanism for protecting certain especially sensitive law enforcement matters under subsection (c) of the FOIA. These exclusions authorize federal law enforcement agencies to treat especially sensitive records as not subject to the requirements of FOIA. Contact the FOIA/PA section in Headquarters before citing these exclusions.

(5) FOIA Fees. Because the Service is permitted to charge FOIA requesters, Service personnel should keep track of time spent processing specific FOIA requests.

(c) The Privacy Act. (1) General. The Privacy Act of 1974, 5 U.S.C. 552a, establishes safeguards for the protection of records the Government collects and maintains on United States citizens and lawfully admitted permanent residents. Specifically, it mandates that the Government:

- Inform people at the time it is collecting information about them, why this information is being collected and how it will be used.
- Publish a notice in the Federal Register of new or revised systems of records on individuals.
- Publish a notice in the Federal Register before conducting computer matching programs.
- Assure that the information is accurate relevant, complete and up-to-date before disclosing it to others.
- Allow individuals access to records on themselves.
- Allow individuals to find out about disclosures of their records to other agencies or persons.
- Provide individuals with the opportunity to correct inaccuracies in their records.

(2) Privacy Act Records. The Privacy Act applies to any item, collection or grouping of information about a *United States citizen* or *lawfully admitted permanent resident* that can be retrieved by using the persons name, social security number, alien registration number or other personal identifier. The Privacy Act applies to personal information stored in computers as well as that maintained in paper files. The Privacy Act applies to records maintained by the Executive

Branch of the Federal Government. It does not apply to records held by Congress, the courts, local government or private organizations. INS and each Federal Government agency must publish in the Federal Register a description of its record systems that are covered by the Privacy Act. A list of major Service records systems is located on the INS Internet web site, in the Electronic Reading Room of the FOIA/PA section. The record system with which we are most familiar is the Alien File and Central Index System. Through this record system all A-files can be retrieved by name and by date of birth or A-number. For additional information on Service records systems, refer to the Records Operations Handbook.

(3) Conditions of Disclosure. The Privacy Act lists twelve conditions under which information from records pertaining to individuals may be disclosed without the prior consent of the individuals to whom the records pertain:

- To other employees of an agency, in the performance of their official duties. The Department of Justice is the agency in this case, and officials of any component of the Department of Justice may be granted access to information from Service records without prior consent of the subject if such official has a “need to know” to do his/her job.
- To the public, when disclosure would be required or permitted under the Freedom of Information Act. Information from a public record, such as the judicial record of naturalization, may be disclosed to anyone. Information available to the public from personnel records includes the name, past and present position, titles, grades, salaries, and duty stations of specific Federal Government employees.
- For routine uses which have been published in the Federal Register in the System Notice for each Privacy Act record system.
- To the Bureau of Census, for census or survey purposes.
- To a person or another agency for statistical research or reporting purposes, when the individual identifying information is removed.
- To the National Archives for preservation of records of historical value.
- To other agencies or organizations for law enforcement purposes upon written request from the agency head.
- To others, under emergency circumstances affecting the health or safety of an individual.
- To the Congress or committees to the extent of matter within their official jurisdiction.
- To the Comptroller General in the course of duties of the General Accounting Office.
- By order of a court of competent jurisdiction.

- To consumer reporting agencies in accordance with section 3(d) of the Federal Claims Collection Act of 1986.

(4) Accounting for Disclosures. The Privacy Act requires an accounting of the disclosure of information from records pertaining to an individual except for disclosures to other components of the Department of Justice or disclosures made under the Freedom of Information Act. The accounting record must contain the date, nature and purpose of the disclosure and the name and address of the person or agency to whom disclosure was made. Form G-658, Record of Information Disclosure, Privacy Act, is recommended for the necessary accounting of routine uses or other conditions of disclosure.

Many INS forms contain personal data about individuals which may be requested by other agencies for routine uses. When these forms are used to make disclosures of personal information about individuals who are United States citizens or aliens lawfully admitted for permanent residence, an accounting is required for Privacy Act reporting purposes.

(5) Rights and Responsibilities. As an INS employee you "wear two hats" - one as a citizen who is entitled to the full protection and rights established by the Privacy Act, the other as a Federal employee who works with records containing personal information and who shares some responsibility in carrying out the requirements of the law.

Administrative, technical, and physical safeguards are required for records, and employees who handle records must adhere to rules of conduct to protect information from the possibility of unwarranted disclosure or access by unauthorized persons. The importance of this responsibility is evident from the penalties imposed by the Privacy Act on Federal employees who violate certain sections of the law. A fine of up to \$5000 can be imposed for willfully maintaining a Privacy Act record system that has not been published in the Federal Register or for willfully making an unauthorized disclosure. Information from Privacy Act records cannot be disclosed without the consent of the record subject, except for specific conditions listed in the Act and specific routine uses published by INS with each system notice.

(6) Individual Access to and Correction of Records. Agencies must allow individuals to gain access to records about themselves. They must be permitted to review the records, may be accompanied by representatives, and shall be permitted to obtain a copy of all or any portion of records in a comprehensive form. Individuals must be permitted to request amendment or correction of records pertaining to them, and such requests must be acknowledged within 10 working days of receipt. After acknowledgment, the agency must correct the information in question promptly or inform the individual of his right to request a review of the decision by applying to the Attorney General within 60 days of receipt of the reply. If the individual disagrees with the decision not to amend a record, he or she must be allowed to file a statement of his or her views which must be provided to any source that has received information from the record.

10.13 Public Copies of Decisions.

(a) General. Under the Freedom of Information Act the Service is required to maintain a public

reading room. The location of the Service reading room is in the Headquarters ULLICO Building, 2nd Floor, Washington, D.C. In addition to general reference materials about the immigration laws, each office is required to maintain public copies, with identifying details blacked out, of decisions on various types of cases. It is not required that public copies be made of every decision. Public copies of orders need not be prepared and filed in the public reading rooms when it is readily known, without research, that an identical order has been prepared and filed in a similar case. The Service is also making available on the INS Internet web site much of the information which is available in public reading rooms. [See 8 CFR 103.9.]

(b) Deletion of Identifying Data. Deletions of identifying data shall not be made on "public copies" (copies which must be made available for inspection and copying by the public) of orders in proceedings which are open to the public or in an administrative fine case.

In any other proceeding in which the order must be made available to the public, the names and addresses of the applicant, petitioner, beneficiary, and witnesses shall be deleted from the public copies. The foregoing are not intended to be exclusive. Other data which would make the individual readily identifiable, such as his or her present place of employment, should also be deleted. Deletions shall be accomplished by painting over the data to be deleted with a black felt marker (deletions may also be made electronically if the denial is generated by a word processor); care shall be taken to assure that none of the deleted material is visible. Each public copy shall be stamped in the lower left corner, "Identifying data deleted to prevent clearly unwarranted invasion of personal privacy."

Deletion of identifying data and stamping will be the responsibility of the following:

(1) The district director or service center director, whenever an order rendered by him or her, or by an officer in charge within the geographical area over which the district director has jurisdiction has become final;

(2) The immigration judge, whenever an order rendered has become final; and

(3) The officer in charge outside the United States, whenever an order rendered has become final.

Under its procedure, the Board of Immigration Appeals performs the required deletions and stamping whenever the Board renders a final order on appeal or certification.

When deletions of names and addresses from the public copies are required under this instruction, the appellate authority will accomplish the deletions and stamp the public copies of the order entered by that authority, as well as the copies of the initial decisions. This will insure that identical deletions are made on all copies.

(c) Preparation of Public Copies of Initial Decisions Which Are Appealed or Certified. Upon appeal or certification to the Commissioner, two copies of the initial decision stamped "PUBLIC COPY" in the upper right hand corner shall accompany the record of proceeding (in addition to the signed record copy of that decision) when the case is forwarded to the Commissioner. Upon

appeal or certification to the Board of Immigration Appeals, one copy of the initial decision shall be so stamped and shall accompany the record of proceeding when the case is forwarded to the Board of Immigration Appeals; this copy is in addition to the one described in the procedures for certification.

The appellate authority will transmit to the office of origin a public copy of the appellate decision, to which the appellate authority will attach a public copy of the initial decision.

(d) Coding of Orders. To facilitate sorting and filing of orders (whether granted or denied) in the reading room or area, each public copy shall be coded by the transmitting office at the upper left of the first page in accordance with the alphabetical letter listed in Appendix 10-1.

(e) Distribution of Public Copies. When an order has become final, one public copy shall be forwarded expeditiously to Headquarters. Copies from the district directors, officers in charge or immigration judges shall be forwarded through the regional office. Service center copies shall be forwarded directly to Headquarters.

When any order entered by a Service office outside the United States has become final, public copies with appropriate deletions and stamps, shall be forwarded expeditiously, through the district office, to Headquarters. Service offices outside the United States shall not retain a public copy of orders, as such offices are not required to make copies available, but shall maintain log copies for internal audit purposes separated by category of case and kept chronologically for two years.

Under its procedures, the Board of Immigration Appeals retains one public copy of each of its final orders which must be made available to the public, and transmits one public copy to the district office of origin.

Whenever a decision is made by a Service officer (including an immigration judge) on a motion or on a renewed application, a notation reading "Prior decision (date of prior decision)" shall be made on the public copies of the subsequent decision, immediately below the alphabetical letter designation assigned to that category of orders, before those copies are sent to the public reading rooms.

When an order which must be made available for inspection by the public is not on 8 1/2" x 11 " sheets of paper, the public copies shall be machine-reproduced on sheets of paper that size before they are distributed.

(f) Maintenance of Opinions and Orders in Public Reading Rooms. Public copies of unpublished decisions shall be filed in chronological sequence by category of case, and shall be maintained in the reading room or area where the public may inspect them in Headquarters. Hardcover, looseleaf, three-ring binders shall be used to house the orders, or they will be made electronically available on-line. If the volume of orders in any category is large enough to so warrant, a separate binder shall be maintained for each such category. On the other hand, if the volume in any successively lettered categories as listed above does not warrant a separate binder, several such categories separated by dividers may be included in a single binder. The spine (back) of

each looseleaf binder shall be appropriately labeled.

When a public copy of a decision by a Service officer (including an immigration judge) is received for filing in a public reading room, and the public copy bears a notation reading "Prior decision (date of decision)", the prior decision referred to shall be removed from the chronological sequence in which it had been filed, shall be stapled behind the subsequent decision, and both decisions shall then be filed in the appropriate category, chronologically according to the date of the subsequent decision.

Similarly when a district office receives a public copy of a Board of Immigration Appeals decision, that decision shall be examined to see whether it grants or denies an application or petition which the district director had previously denied. If it does, and if the public copy of the district director's decision has been sent previously to the public reading room, before the public copy of the Board's decision is filed in the public reading room, a notation "Prior decision (date of prior decision)" shall be inserted on that copy, immediately below the alphabetical letter designation accorded to the Board's decision, and the prior decision shall be disposed of in the same manner indicated in the preceding paragraph. The same action shall be taken with respect to public copies of Board decisions in fine proceedings.

(g) Assistance to the Public in Locating Orders. When a member of the public requests access to a copy of an order relating to a specifically named individual, he or she shall be informed of the manner in which public copies of decisions are filed and informed that identifying data is deleted to prevent unwarranted invasion of personal privacy except when the decision is entered in an expulsion, naturalization, or administrative fine proceeding, or any other proceeding that was open to the public. If a member of the public nevertheless states that he or she desires to see an unpublished decision relating to a specifically named individual in a type of case in which identifying data is deleted from the public copy of the decision, he or she shall be advised to file an application under the Freedom of Information Act as provided in 8 CFR 103.10.

(h) Matters Not Within Purview of 8 CFR 103.9. The following are not decisions within the meaning of 8 CFR 103.9 and , therefore, are not available to the public:

(1) Notices of approval or denial communicated to an applicant or petitioner by a form on which only a preprinted or stamped item is checked or inserted (e.g., Forms I-541, I-542, I-171, I-180). However, a form on which the reason for decision has been typed because the preprinted or stamped items do not apply, is not exempt from being made available for public inspection;

(2) Notations by check mark, stamp or other brief endorsement on an application or petition showing approval or denial;

(3) Memoranda of creation of records of lawful permanent residence (Forms I-181);

(4) Immigration offices' admission stamp on immigrant visas, passports or Forms I-94;

(5) Notices of voidance of nonresident alien border crossing cards bearing a stamped reason for such voidance;

(6) Reports and recommendations on page 4 of Form N-600, on Form N-600A, on Form N-635, and on any other similar form relating to the disposition of an application for a certificate of citizenship under section 341 of the Act or under any predecessor statute, including those which are supported by a supplementary report;

(7) Reports and recommendations completed on preprinted Form N-580, Application for a Certificate of Naturalization or Repatriation; Form N-577, Application for a Special Certificate of Naturalization; Form N-565, Application for a New Naturalization or Citizenship Paper; Form N-455, Application for Transfer of Petition for Naturalization; Form N-470, Application to Preserve Residence for Naturalization Purposes; and on any preprinted form used for the purpose of cancelling a certificate of citizenship under section 342 of the Act on the sole ground that respondent has confessed alienage;

(8) Memoranda of designated examiners and regional directors pursuant to 8 CFR 335.12; and

(9) Summary decisions of immigration judges, and oral opinions dictated into the record by an immigration judge and not transcribed.

(i) Cases Involving National Security, Foreign Policy and Confidentially Furnished Information. Cases involving national security, foreign policy and confidentially furnished information, and for that reason, orders of grant or denial in such cases shall not be made available.

(j) Decisions Involving Waiver of Foreign Residence Requirement for Exchange Aliens. A copy of each letter notifying an applicant of the approval of his application for a waiver of the foreign residence requirement under section 212(e) of the Act on the basis of exceptional hardship or persecution shall be processed and forwarded to the reading room in the manner set forth above. In addition, there shall be attached a copy of the director's request for the recommendation of the Department of State. Similarly, when a letter denying a waiver is sent to an applicant, the reason for denial shall be given and a copy of the letter shall be routed to the reading room. If a request was made for the State Department's recommendation, a copy of the request shall be attached to the reading-room copy of the denial letter.

A copy of each letter notifying an alien of the approval or denial of a section 212(e) waiver, based upon the request of an interested government agency or based upon a written statement of the alien's country of nationality or last residence that it has no objection to the waiver, shall be processed and forwarded to the reading room in the manner set forth above.

10.14 Directed Decisions.

On occasion, an officer and one or more of his or her supervisors will disagree on the appropriate decision in a particular case. If, after thoroughly researching the matter and discussing the merits of the case, they are still not in agreement the case should be decided in accordance with the views of the higher ranking supervisory officer. However, the record should clearly reflect that the decision was made by that supervisory officer. An adjudicator should never sign something

when he or she disagrees with the decision merely because a supervisory officer directs such action. If the adjudicator has reason to believe that the directed decision is wrong either because he or she does not believe a favorable exercise of discretion is warranted or because there is a disagreement over what is permitted by statute or regulation, the decision should be signed by the supervisory officer and the file noted by the adjudicator. In unusual situations where a clarification of policy or regulations would be useful, the supervisory officer may agree to certify a decision to the Administrative Appeals Office or the Board of Immigration Appeals if the officer and supervisor are unable to reach agreement. *If the adjudicator believes there is actual unlawful action being directed, he or she should immediately contact the Office of Internal Audit to report the matter.*

10.15 Exercise of Discretion; Uniformity of Decisions.

Although all types of adjudications involve proper application of laws and regulations, a few also involve an exercise of the Attorney General's discretion: adjustment of status under section 245 of the Act, change of status under section 248 of the Act and various waivers of inadmissibility are all discretionary applications, requiring both an application of law and a consideration of the specific facts relevant to the case. An exercise of discretion does not mean the decision can be arbitrary, inconsistent or dependant upon intangible or imagined circumstances. Although regulations can provide guidelines for many of the types of factors which are appropriate for consideration, a regulation cannot dictate the outcome of a discretionary application. [See, for example, HHS Poverty Guidelines in Appendix 10-3.] For each type of adjudication, there is also a body of precedent case law which is intended to provide guidance on how to consider evidence and weigh the favorable and adverse factors present in a case. The adjudicator must be familiar with the common factors and how much weight is given to each factor in the body of precedent case law. The case law and regulatory guidelines provide a framework to assist in arriving at decisions which are consistent and fair, regardless of where the case is adjudicated or by whom.

It will be useful, particularly for inexperienced adjudicators, to discuss unusual fact patterns and novel cases requiring an exercise of discretion with peers and supervisors. In particularly difficult or unusual cases, the decision may be certified for review to the Administrative Appeals Office. Such certifications may ultimately result in expansion of the body of precedent case law.

Discretionary decisions or those involving complex facts, whether the outcome is favorable or unfavorable to the petitioner or applicant, require supervisory review.

NOTE: Even in non-discretionary cases, the consideration of evidence is somewhat subjective. For example, in considering an employment-based petition, the adjudicator must examine the beneficiary's employment experience and determine if the experience meets or exceeds , in quality and quantity, the experience requirement stated on the labor certification by the employer. However, a subjective consideration of facts should not be confused with an exercise of discretion. Like an exercise of discretion, a subjective consideration of facts does not mean the decision can be arbitrary, inconsistent or dependant upon intangible or imagined circumstances.

10.16 Denial for Lack of Prosecution.

Any application or petition may be denied, pursuant to 8 CFR 103.2(b), if a petitioner or applicant fails to appear for a required interview, fails to provide an original document when requested to do so, fails to appear for fingerprinting as directed or fails to provide additional evidence when requested. When an application is denied for lack of prosecution, the petitioner, applicant or attorney of record, as appropriate, must be notified in writing of the decision. If such a notice of denial is returned undeliverable, place the notice, including the original mailing envelope, in the appropriate file as evidence of attempted service. Such a denial is without prejudice to a later re-filing of the application or petition.

10.17 Motions to Reopen or Reconsider.

(a) General. A motion to reopen or a motion to reconsider a Service decision may be filed provided the request meets the requirements of 8 CFR 103.5. Motions to the BIA must meet the requirements of 8 CFR 3.2. Ordinarily a motion is adjudicated by the same officer who made the original decision. In all cases, the motion must be considered by the same office (district, service center, immigration court, AAO, or BIA) which most recently decided the case. A motion may be filed by the applicant or petitioner or by the Service.

(b) Motion Filed by Applicant or Petitioner. A motion filed by the applicant or petitioner for consideration by the Service or the BIA is filed in writing with the fee prescribed in 8 CFR 103.7. Consideration of a motion is a two-stage process: the first stage is a determination as to whether the case should be reopened or reconsidered, and the second stage (for those motions that are reopened or reconsidered) is the rendering of a new decision. [NOTE: Although 8 CFR 103.5(a)(1)(iii) states that the motion should be filed on Form I-290A, that form has not been in existence as an approved form since 1994 (and prior to that date was only used for a different purpose). Accordingly, the moving party cannot be held to that particular requirement and a motion made in writing cannot be rejected simply because it is not on that particular form.]

A motion to the Service which does not meet one or more of the requirements for a motion set forth in 8 CFR 103.5 (other than the Form I-290A requirement) must be dismissed for failure to meet those requirements, using a written order describing the deficiencies. The fee is not refunded in such a situation, unless it is determined that there was some Service error involved in the applicant or petitioner submitting the motion.

If the case is accepted for reopening or reconsideration, a new decision must be issued in formal order format. Such decision might be:

- To approve the application or petition, if all reasons for the original denial have been overcome and no new reasons have arisen;
- To deny the application or petition for the same reasons as in the original decisions, but with an explanation as to why the arguments submitted in the motion were not persuasive;
- To deny the application or petition for reasons not contained in the original decision, provided the applicant or petitioner is given an opportunity to review and rebut any new evidence of which he or she was not already aware; or

- A combination of the second and third possibilities (reaffirmation of the original reasons plus the addition of new reasons).

(c) Service Motions. If you determine that a petition should not have been approved but there are no specifically applicable grounds for revocation in the regulations, or that a petition should not have been denied, the petition may be reopened on Service motion and a new decision issued. [See 8 CFR103.5(a)(5).] If the motion is adverse to the petitioner or applicant, a “notice of intent” should be used; if the new decision is favorable, the decision can be issued without any prior notice. A new appeal period commences with the issuance of a new adverse decision. [See also “Petition Revocation” in Chapter 20 of this manual.]

10.18 Certification of Decisions.

(a) General. A certification is a request by the deciding official for review of a decision (approval or denial) by an appellate authority. A decision may be certified to the appropriate appellate authority (AAO or BIA). In a case where there is no appeal provided by regulation, certification is to the AAO. Certification should be initiated in a case where:

- Headquarters has directed certification of an individual case, class of cases or cases with particular fact patterns;
- the deciding official believes the facts or issues of a case are so novel or complex that review by a higher level of authority is an appropriate means of obtaining guidance.

A certification, whether the decision is to approve or deny a case, requires a formal written order and preparation of Form I-290C. A certified decision is not considered final until the order has been considered by the appellate body. [See 8 CFR103.4.]

(b) Procedures for Forwarding. In order to certify a case, the office preparing the initial decision must assemble a complete record of proceedings in the same manner as a record prepared for an appeal, including the “Board” and “Public” copies.

10.19 Use of Classified Information in Adjudications Decisions [RESERVED]